SUPREME COURT, U. S.

No. 1255

FILED
MAR 23 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

REUBEN L. JONES,

Appellant,

vs.

STATE OF LOUISIANA,

Appellee.

Appeal from the Supreme Court of Louisiana.

APPELLANT'S JURISDICTIONAL STATEMENT

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LECOMTE, SHREVEPORT, LOUISIANA

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APPELLANT'S JURISDICTIONAL STATEMENT

I. OPINION BELOW

The Opinion of the Supreme Court of Louisiana is reported at ..... La. ....., 204 So. 2d 775 and is appended hereto. There are no other reported opinions.

II. GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This is an appeal taken under 28 U.S.C. 1257 (2) from the final judgment of the Supreme Court of Louisiana in the reported state criminal case of *State of Louisiana vs. Reuben L. Jones*, Number 48,610 on the docket of that court. The judgment of that court became final

December 27, 1967 and was apparently entered the following day. Notice of appeal was filed in that court on or about January 6, 1968.

The validity of the following state statutes and state constitutional provisions was drawn in question below on the ground of their being repugnant to the jury trial provision of the Sixth Amendment to the Constitution of the United States as made applicable to the States by the Fourteenth Amendment to the Constitution of the United States: Louisiana Constitution of 1921, Article VII, Section 41; Louisiana Code of Criminal Procedure, Articles 779 and 933 (3) and (4) (former Louisiana Revised Statutes 15:340 and 341); Louisiana Revised Statutes 14:95 A. (3); and Louisiana Revised Statutes 14:284. The decision below was in favor of the validity of these provisions. The full text of these provisions is appended hereto.

III QUESTIONS PRESENTED

(1) Do state statutes that deny the right to trial by jury in a prosecution for Possession of Burglar Tools, where a one-year prison term may be and is actually imposed, violate the Sixth and Fourteenth Amendments to the United States Constitution?

(2) Do state statutes that deny the right to trial by jury in a prosecution for Possession of Burglar Tools, where a two-year prison term may be imposed and a one-year prison term is actually imposed, violate the Sixth

and Fourteenth Amendments to the United States Constitution?

(3) Do. state statutes that deny the right to trial by jury in a prosecution for Peeping Tom, classified among "OFFENSES AFFECTING PUBLIC MORALS", where a six-month prison term may be and is actually imposed, violate the Sixth and Fourteenth Amendments to the United States Constitution?

IV. STATEMENT OF THE CASE

Reuben L. Jones, Appellant herein, was charged with Possession of Burglar Tools by Bill of Information filed by the District Attorney in the First Judicial District Court of Louisiana July 8, 1966. On that same date, an additional Bill of Information was filed therein charging Appellant with the curious offense of Peeping Tom, alleged to have been committed at the same time and place as the Possession of Burglar Tools. On August 16, 1966, another Bill of Information was filed in that court charging Appellant with a second and separate violation of Possession of Burglar Tools.

In Louisiana, Possession of Burglar Tools is a crime punishable by a term of one years imprisonment on the first conviction and two years imprisonment on the second conviction. La. Rev. Stat. 14:95. Peeping Tom is punishable by six-months imprisonment. La. Rev. Stat. 14:284. Because both offenses are not punishable by "imprisonment at hard labor", state law categorizes them as "misdemeanors". La. C.Cr.P., Art. 933 (3) and

(4). Article 779 of the Louisiana Code of Criminal Procedure in express terms denies the right to trial by jury in cases classified as "misdemeanors". The phrase "imprisonment at hard labor" is a term of art used in Louisiana Law denoting confinement in the state penitentiary as opposed to confinement in the parsh jail. It has been expressly held that confinement in the parish jail subject to actual physical hard labor in a road gang is not "imprisonment at hard labor". *State vs. Hamilton*, 128 La. 91, 54 So. 482.

Prior to trial in the state court, Appellant filed on October 18, 1966 a "Motion For Trial By Jury" in each of these three criminal prosecutions. In each of these three written motions, Appellant urged that he was "entitled under the Sixth and Fourteenth Amendments to the Constitution of the United States to a trial by an impartial jury." The motions were overruled by the trial judge on the authority of existing state law. Appellant excepted to the ruling of the court and reserved and subsequently perfected formal bills of exception. These bills as perfected constituted the essential parts of the record considered by the Supreme Court of Louisiana in its written opinion appended hereto.

Trial was had on all three charges on December 9, 1966 before a judge sitting alone without jury. The judge found Appellant guilty on all three charges.

That the defendant was prejudiced by the denial of his Sixth Amendment right to trial by an impartial jury is clearly illustrated by the revealing comments of the

trial judge in his opinion denying the defendant's motion for a directed verdict found on page 28 of the Transcript of Testimony in No. 68,964:

> THE COURT: This is a borderline case with borderline evidence. But the distinguishing part of this case and any other like it is Reuben Jones, and he is well known. He has been convicted before. When you think of house prowling, you think of Reuben Jones. He was known to the officers as having been a burglar. *He is known to the Court as having been a burglar before these cases today ever began. We are not required to put away the knowledge that we acquire in the ordinary course of living.* (Emphasis added).

Had plaintiff been given a trial by jury, he would have had the right to examine prospective jurors on *voir dire* concerning their knowledge of the defendant and to challenge for cause those prospective jurors who knew the defendant ". . . as having been a burglar before these cases today ever began . . ." and who could not put away in their minds such knowledge even though they had acquired it ". . . in the ordinary course of living".

Appellant then appealed to the Supreme Court of Louisiana. The decision of that court, as reported in the appended opinion, was in favor of the validity of the state law denying trial by jury in cases determined by the Legislature to be "misdemeanors". Appellant is presently at liberty on bond.

(4). Article 779 of the Louisiana Code of Criminal Procedure in express terms denies the right to trial by jury in cases classified as "misdemeanors". The phrase "imprisonment at hard labor" is a term of art used in Louisiana Law denoting confinement in the state penitentiary as opposed to confinement in the parsh jail. It has been expressly held that confinement in the parish jail subject to actual physical hard labor in a road gang is not "imprisonment at hard labor". *State vs. Hamilton*, 128 La. 91, 54 So. 482.

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V. SUBSTANTIAL FEDERAL QUESTIONS

The questions presented by this appeal clearly are substantial. The case of *Gary Duncan vs. State of Louisiana*, Number 410 in the Supreme Court of the United States is presently before the Court on appeal from the Supreme Court of Louisiana, probable jurisdiction having been noted therein by the Court on October 9, 1967. The *Duncan* case involves the same question presented by this appeal, although the matter is more broadly stated and presented by that case. The offenses involved in this instant appeal clearly involve moral turpitude, and the sentences actually imposed, six months and one year, are substantially longer than the sixty day sentence imposed in the *Duncan* case. We had hoped to delay docketing this appeal until after a decision was reported in the *Duncan* case so that we might more carefully delineate the precise issues if the decision in the Duncan case was adverse to the Appellant, but we were unable to do so because of the running of time.

Regardless of the decision in the Duncan case, the questions presented by this appeal should receive plenary consideration, with briefs on the merits and oral argument because of the extensive consideration given to the issue by the Louisiana Supreme Court in its written opinion appended hereto. In short, we submit that Appellant herein should not be penalized for having brought his case before this court by way of the Supreme Court of Louisiana rather than directly to this court from the trial court as was done in the *Duncan* case. By appealing to the Supreme Court of Louisiana, Appellant provided that

court with an opportunity to reappraise its prior jurisprudence in the light of recent decisions of this court which make it clear that this court ". . . has rejected the notion that the Fourteenth Amendment applies to the states only a 'watered-down subjective version of the Bill of Rights,' . . . " *Malloy vs. Hogan*, 378 U.S. 1, 84 Supreme Court 1489, 1498. Although in retrospect, our appeal to the Supreme Court of the State of Louisiana may appear to some eyes to have been somewhat quixote, it did produce the clear and unequivocal opinion appended hereto.

This appeal should be heard and the decree of the Louisiana Supreme Court as set out in the appended opinion should be reversed.

Respectfully submitted,

JACK & JACK

By: .....

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Attorneys for Appellant

ATTORNEY OF RECORD:

.....

Billy R. Pesnell,
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Shreveport, Louisiana.

March, 1968

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VII, Section 41 of the Louisiana Constitution of 1921:

> . . . All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

Article 779, Code of Criminal Procedure of Louisiana:

> Trial of Misdemeanors
>
> A defendant charged with a misdemeanor shall be tried by the court without a jury.

Article 933, Code of Criminal Procedure of Louisiana:

> Offenses
>
> Except where the context clearly indicates otherwise as used in this Code:
>
> * * * * *
>
> (3) "felony" means an offense that may be punished by death or imprisonment at hard labor.
>
> (4) "misdemeanor" means any offense other than a felony, and includes the violation of an ordinance providing a penal sanction.

Louisiana Revised Statutes 14:95:

Illegal carrying of weapons

A. Illegal carrying of weapons is:

* * * *

(3) The ownership, possession, custody or use of any tools, or dynamite or nitroglycerine, or explosives, or other instrumentality customarily used by thieves or burglars at any time by any person with the intent to commit a crime;

* * * *

B. Whoever commits the crime of illegal carrying of weapons shall be fined not more than $500.00, or imprisoned for not more than one year or both.

C. On a second conviction, the offender shall be fined not less than $200.00 nor more than $1,000.00, or imprisoned for not more than two years, or both.

Louisiana Revised Statutes 14:284:

Peeping Tom; penalty

No person shall perform such acts as will make him a "Peeping Tom" on or about the premises of another, or go upon the premises of another for the purpose of becoming a "Peeping Tom".

"Peeping Tom" as used in this Section means one who peeps through windows or doors, or other places, situated on or about the premises of another for the purpose of spying upon or invading the privacy of persons spied upon without the consent of the persons spied upon. It is not a necessary

element of this offense that the "Peeping Tom" be upon the premises of the person being spied upon.

Whoever violates this Section shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

STATE of Louisiana

v.

Reuben L. JONES (Reuben Leroy Jones).

No. 48610.

Supreme Court of Louisiana.

Dec. 11, 1967.

Defendant was convicted in the First Judicial District Court, Parish of Caddo, John A. Dixon, Jr., J., of possession of burglary tools and of violating the Peeping Tom statute, and he appealed. The Supreme Court, McCaleb, J., held, inter alia, that an unbiased judge can dispense justice in a misdemeanor case with the same quality of fairness and impartiality which could be expected of a jury which acts under the instructions of the judge, and such being so no reason exists for declaring that Sixth Amendment provision for trial by jury is made obligatory upon the states by the Fourteenth Amendment.

Affirmed in part, appeal dismissed in part.

1. Criminal Law ⇐1020

Supreme Court was without jurisdiction of appeal taken from conviction of violating Peeping Tom statute since sentence imposed for that violation did not exceed six months in prison. LSA–R.S. 14:284; LSA–Const. art. 7, § 10.

2. Criminal Law ⇐1020

Supreme Court had no jurisdiction of appeal from conviction where sentence did not exceed six months in prison, as against contention that it had jurisdiction under constitutional article declaring that if the case is appealed properly to the Supreme Court on any issue it has appellate jurisdiction over all other issues involved, where appeal from defendant's conviction for violation of Peeping Tom statute was separate and distinct from his appeals from convictions in the other two cases, the three appeals having been improperly filed as one appeal. LSA–R.S. 14:284; LSA–Const. art. 7, § 10.

3. Jury ⇐22(2)

Constitutional right of trial by jury does not extend to trials for petty offenses.

4. Criminal Law ⇐633(1)

A "fair trial" means simply a trial that is just and in which the accused is given benefit of all the safeguards provided by the Constitution and laws, and in which even-handed justice is dispensed.

See publication Words and Phrases for other judicial constructions and definitions.

5. Constitutional Law ⇐267

An unbiased judge can dispense justice in a misdemeanor case with the same quality of fairness and impartiality which could be expected of a jury which acts under the instructions of the judge, and such being so no reason exists for declaring that Sixth Amendment provision for trial by jury is made obligatory upon the states by the Fourteenth Amendment. U.S.C.A.Const. Amends. 6, 14.

6. Criminal Law ⇐1134(3)

Complaint that evidence is insufficient to sustain conviction presents nothing for review by Supreme Court on appeal since it

is without jurisdiction to determine questions of fact in a criminal case.

7. Criminal Law ⇐1035(3), 1090(11)

Argument raised for first time in Supreme Court that defendant was prejudiced by denial of his rights to trial by jury because of comments made by trial judge in overruling motion for directed verdict would not be considered since motion for directed verdict was not founded on that ground, and no objection was made or a bill of exceptions taken to alleged improper remarks of judge at time they were given.

Jack & Jack, by Wellborn Jack, Jr., Shreveport, for defendant-appellant.

Jack P. F. Gremillion, Atty. Gen., William P. Schuler, Asst. Atty. Gen., John A. Richardson, Dist. Atty., Charles R. Lindsay, Asst. Dist. Atty., Albert S. Lutz, Jr., Asst. Dist. Atty., for appellee.

McCALEB, Justice.

Appellant was charged in bills of information with two separate violations of R.S. 14:95(3) for possession of burglar tools, and also for violating R.S. 14:284, the Peeping Tom statute. He was tried, found guilty in all three cases, and sentenced to serve one year in the parish prison on each charge for possession of burglar tools, and six months for violation of R.S. 14:284, all sentences to run concurrently. From these convictions and sentences appellant has prosecuted a single appeal to this Court.

[1] Aside from the fact that the taking of one appeal from three separate sentences for disconnected violations of one statute and the violation of another statute is improper, we note at the outset that this Court is without jurisdiction of the appeal taken from appellant's conviction of violating the Peeping Tom statute, for the sentence imposed by the trial judge for that violation did not exceed six months in prison.

Section 10 of Article VII of our Constitution provides:

"The following cases only shall be appealable to the Supreme Court:

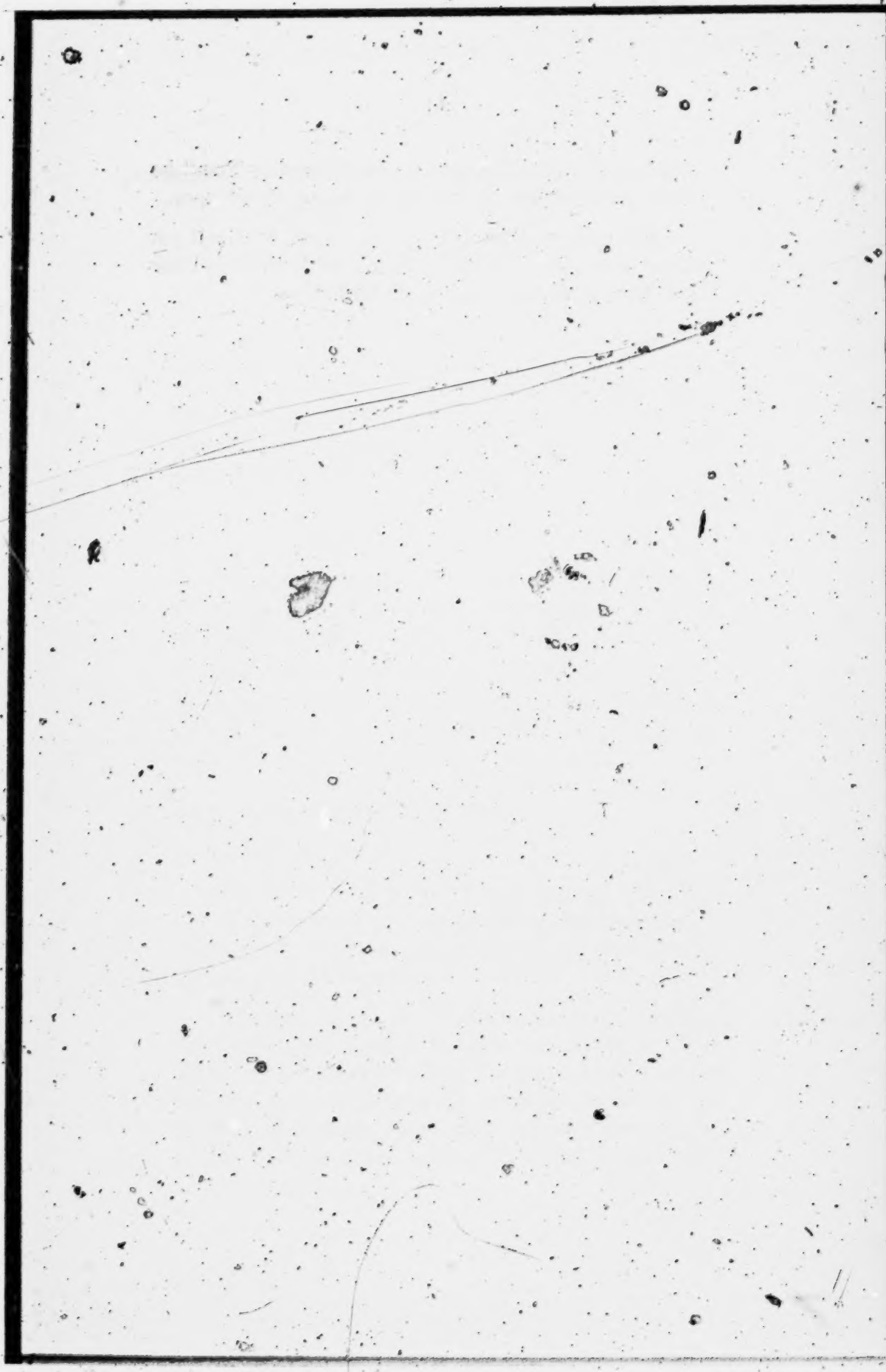
* * * * * * *

(5) Criminal cases in which the penalty of death or imprisonment at hard labor may be imposed, or in which a fine exceeding three hundred dollars or imprisonment exceeding six months has been actually imposed."

Since violation of R.S. 14:284 is a misdemeanor and the sentence imposed thereunder does not exceed six months, this Court is without jurisdiction of appellant's appeal from that conviction. His counsel, however, evidently realizing that this Court is without jurisdiction of that appeal, argue that such jurisdiction conferred on us by the last paragraph of Section 10 of Article VII of the Constitution, which declares that, if a case is appealed properly to this Court on any issue "* * * the Supreme Court has appellate jurisdiction over all other issues involved in the case."

[2] This contention is without substance for the reason that the appeal from appellant's conviction under R.S. 14:284 is separate and distinct from his appeals from the convictions in the other two cases. There are three cases and three appeals which have been improperly filed as one appeal. The constitutional provision relied on by counsel applies to a single case presenting several issues. In such instances, if this Court has jurisdiction on only one issue, it has the right to take cognizance of and decide all other issues, even though those issues would not be directly appealable here. Such is not the case here and, hence, the appeal from the conviction under R.S. 14.284 must be dismissed.

Considering now the appeals from the convictions under R.S. 14:95(3), we note that, whereas several bills of exceptions were reserved during the trial of the case, all have been abandoned except two which



will hereinafter be discussed. These bills do not bear the same numbers in each case, and for this reason they will not be referred to by number but only by content.

Appellant filed motions for a trial by jury in the prosecutions, contending that he is entitled to a jury trial of these misdemeanor cases under the Sixth and Fourteenth Amendments to the Constitution of the United States. These motions were overruled by the trial judge and bills of exceptions duly reserved.

Under the Louisiana procedural system in criminal cases, all misdemeanors, i. e. —cases in which the punishment may not be at hard labor—"* * * shall, until otherwise provided by law, be tried by the judge without a jury" as specified in Section 41 of Article VII of our Constitution, and is also provided by R.S. 15:340 and 341.[1]

Our jurisprudence has rigorously adhered to these constitutional and statutory provisions, holding that an accused in criminal cases is not entitled to a trial by jury where a sentence at hard labor cannot be imposed. State v. Hadad, 142 La. 69, 76 So. 243; State v. Green, 210 La. 190, 26 So.2d 693; State v. Melerine, 236 La. 929, 109 So.2d 471; State v. Garrison, 244 La. 787, 154 So.2d 400; and State v. Henry, 250 La. 682, 198 So.2d 889.

Defense counsel recognize, as they must, the well-defined procedural law of Louisiana. But, pointing to the upheaval in State criminal proceedings wrought by comparatively recent changes in the jurisprudence of the Supreme Court of the United States, which have overturned the long established jurisdictional concept that the first eight Amendments to the Federal Constitution are not applicable to the States (see e. g. Twining v. State of New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97), counsel proclaim that, by virtue of the due process clause of the Fourteenth Amendment, appellant was entitled to a jury trial of the misdemeanors for which he was convicted in the court below. In support of this position, counsel cite among others, Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 84 A.L.R.2d 933; Ker v. State of California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, 93 A.L.R.2d 733; Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653; Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923; and Klopfer v. State of North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1.

The Sixth Amendment to the Federal Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *".

A literal reading of this provision indicates that the framers of the Constitution were referring to Federal tribunals exclusively in providing the place in which trials were to be had, as reference is made to trials in the "* * * district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *", meaning the federal district courts.[2] However, in view of the rationale expressed by the United States Supreme Court in Gideon v. Wainwright, as restated in Pointer v. State of Texas (1965), and reaffirmed in Klopfer v. State of North Carolina (1967), to the effect that any provision of the Bill of Rights which is "'fundamental and essential to a fair trial' is made obligatory upon

1. The proceedings in the instant cases were had before the adoption of the New Code of Criminal Procedure. But see also Articles 779 and 933(4) of the New Code.

2. The first federal district courts were established by Congress under the Judiciary Act of 1789 and the Bill of Rights, comprising the first ten Amendments to the Federal Constitution, was not adopted until 1791.

the States by the Fourteenth Amendment", it must be ascertained whether the federal constitutional right to a jury trial in criminal cases is basically essential to a fair trial of a misdemeanor in the state courts.

Counsel for appellant do not suggest that in all misdemeanor cases in the state courts. On the contrary, it is their position that right to a jury trial in misdemeanor cases is to be determined by the nature of the charge, that is, that charges which are merely malum prohibitum do not require a jury trial, but that the trial of offenses, which are malum in se, require a jury trial to comply with the constitutional guarantee. This theory is said to be sustained by the Supreme Court of the United States in two cases arising in the District of Columbia and, in support of their contention, counsel cite District of Columbia v. Colts, 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177, and District of Columbia v. Clawans, 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843.[3]

[3] It seems to be well established by the decisions of the United States Supreme Court that the constitutional right of trial by jury does not extend to every criminal proceeding, and that a jury is not demandable in trials for petty offenses. Callan v. Wilson, 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223; District of Columbia v. Clawans, supra; Cheff v. Schnackenberg, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629, and the many authorities there cited. A petty offense is classified in 18 U.S.C.A. § 1 (1964 ed.) as: "(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both * * *".

Under the constitutional test laid down in the Colts and Clawans cases, which relate to the moral quality of the offenses rather than the severity of the penalty, counsel submit that, since the possession of burglar tools is malum in se and carries the stigma of moral disapprobation, the guarantee of the Sixth Amendment must be applied by the court.[4] Likewise, under the classification of offenses provided by 18 U.S.C.A. § 1, the offense of possessing burglar tools would require trial by jury since the maximum sentence exceeds six months imprisonment.

[4, 5] Nevertheless, this is not the real question posed for our decision. The real question is simply whether a trial by jury was a prerequisite to due process or an essential to a fair trial in the state court for any misdemeanor case. On this issue we reject appellant's arguments. For, aside from the fact that our Constitution and laws do not sanction jury trials in misdemeanor cases and that we would not, under any circumstances, order a jury trial unless required to do so by final judgment of the United States Supreme Court, we are unable to perceive that an accused in a misdemeanor case is necessarily denied due process or a fair trial when he is tried by a judge instead of a jury. A fair trial, as we understand the expression, means simply a trial that is just; a trial in which

3. In the Colts case, where the charge was reckless operation of a motor vehicle, the court held there was a right to trial by jury since the offense was "grave". In the Clawans case, where the charge was selling secondhand property without a license, the court held no jury trial was constitutionally required because the moral quality of the charge was relatively inoffensive.

4. In addition, counsel point to the fact that the United States Supreme Court has granted writs in Duncan v. Louisiana, No. 410 on the Docket of that Court, to review the question of whether a jury trial is constitutionally required by the Sixth Amendment in all state court criminal prosecutions for misdemeanors. It is stated in the brief that this case is set for argument December 18, 1967, 388 U.S. —, 88 S.Ct. 98, 19 L.Ed.2d 63.

However, we prefer not to delay our decision herein because of the pendency of that case, as it is not ordinarily our policy to withhold decisions in matters under advisement until the views from other courts on the same subject have been expressed.

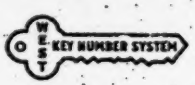
the accused is given the benefit of all the safeguards provided by the Constitution and laws and one in which even-handed justice is dispensed. We cannot conceive, in the absence of proof to the contrary, that there is any rational basis for declaring that an unbiased judge cannot dispense justice in a misdemeanor case with the same quality of fairness and impartiality which could be expected of a jury which acts under the instructions of the judge. If this is so, and we think it is, we are unable to fathom any reason for declaring that the provision contained in the Sixth Amendment for trial by jury "* * * is made obligatory upon the States by the Fourteenth Amendment" as stated in Gideon v. Wainwright.

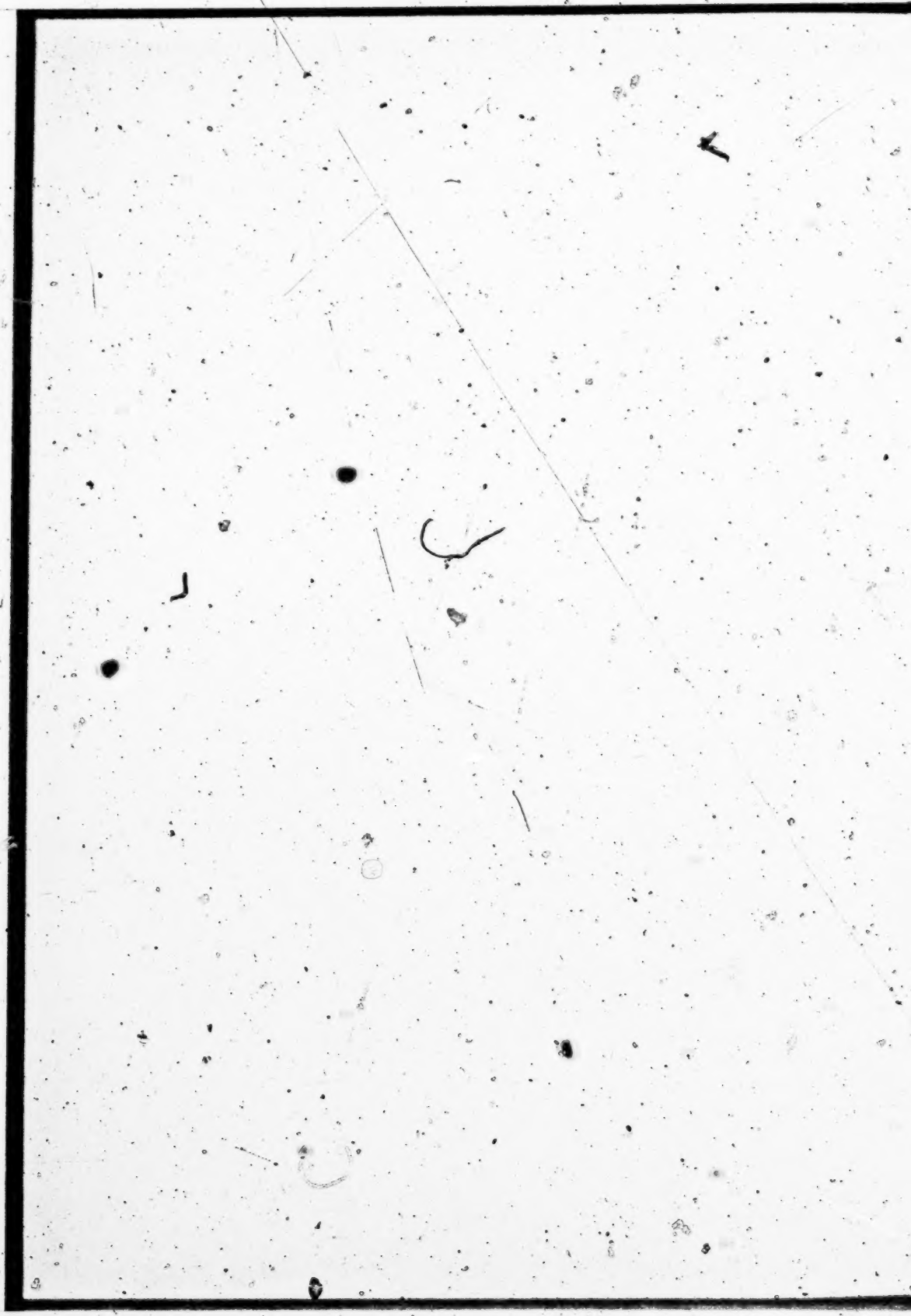
The next bills of exceptions were taken when the trial judge overruled motions for a directed verdict. Defense counsel argue in their brief filed in this Court that appellant was prejudiced by denial of his right to trial by jury because of certain comments made by the trial judge in overruling the motion for a directed verdict in the case bearing the District Court No. 68,-964. However, the formal bills in the record on this motion recite "* * * defendant moved for a directed verdict on the ground that the evidence was insufficient to sustain a conviction."

[6] It is well settled that the complaint that the evidence is insufficient to sustain a conviction presents nothing for our review on appeal, as this Court is without jurisdiction to determine questions of fact in a criminal case. State v. Crovetto, 229 La. 793, 86 So.2d 907; State v. Domino, 234 La. 950, 102 So.2d 227; and State v. Melerine, 236 La. 881, 109 So.2d 454. Compare State v. Gatlin, 241 La. 321, 129 So. 2d 4.

[7] The argument raised for the first time in this Court, that appellant was prejudiced by denial of his right to trial by jury because of the comments made by the trial judge in overruling the motion for a directed verdict will not be considered as the motion for a directed verdict was not founded on that ground, and no objection was made and a bill of exceptions taken to the alleged improper remarks of the judge at the time they were given.

For the reasons assigned appellant's appeal from his conviction for violating R.S. 14:284 is dismissed. As to his other appeals, the convictions and sentences are affirmed.





SUPREME COURT, U. S.

No. 1255

Office-Supreme Court, U.S.
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Appeal from the Supreme Court of Louisiana

MOTION TO DISMISS AND IN THE ALTERNATIVE TO AFFIRM

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

WILLIAM P. SCHULER,
Second Assistant Attorney General.

JOHN A. RICHARDSON,
District Attorney,
First Judicial District.

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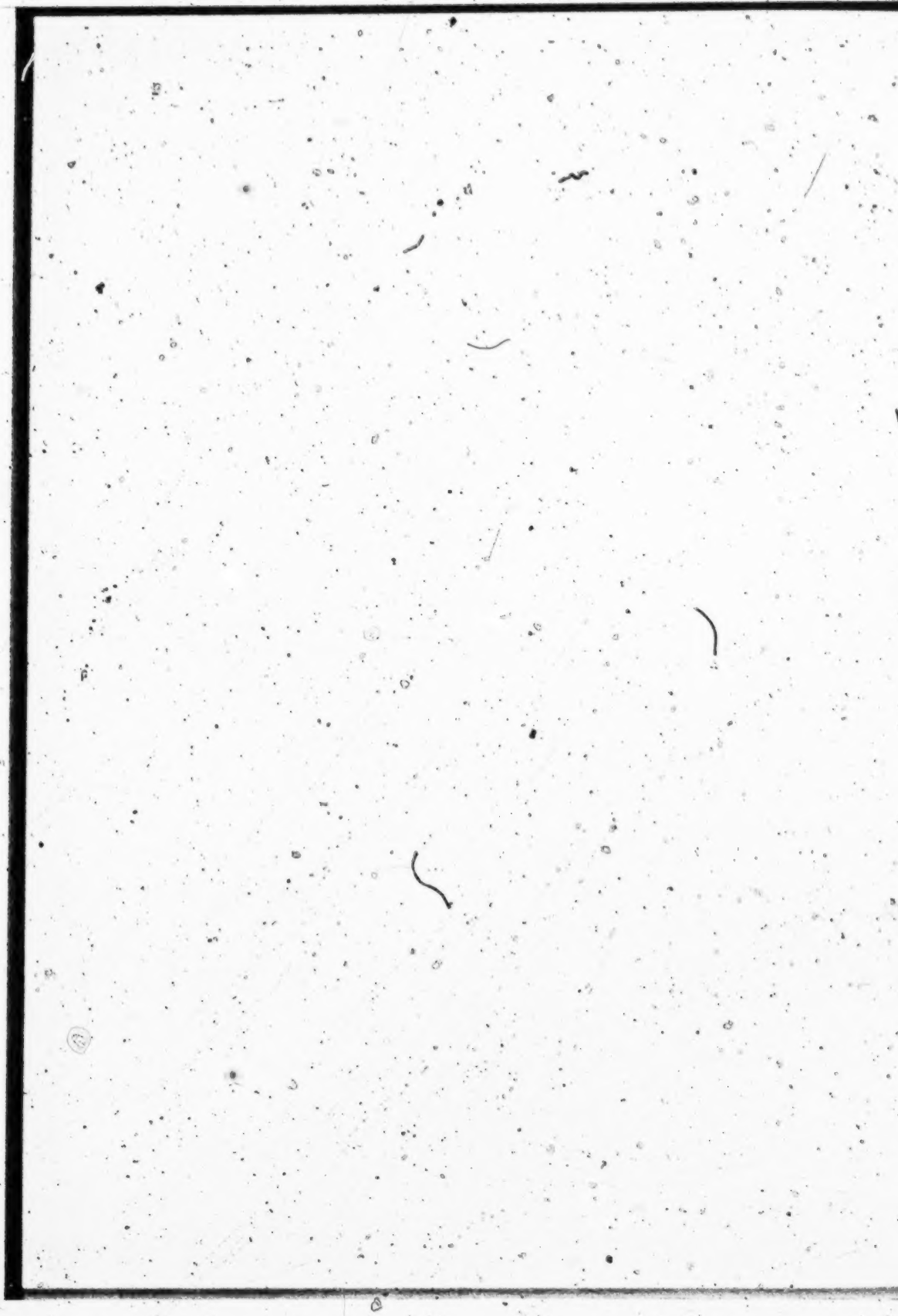
First Judicial District.



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v.

STATE OF LOUISIANA,

Appellee.

Appeal from the Supreme Court of Louisiana

MOTION TO DISMISS AND IN THE ALTERNATIVE TO AFFIRM

Appellee pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States moves that this appeal be dismissed, on the ground that the appeal is not within the jurisdiction of this Court and does not present a substantial federal question and that the judgment rests on an adequate non-federal basis, and that the question sought to be reviewed was not timely or properly raised or passed on by the court below, and in the alternative moves that the final judgment and decree of the Supreme Court of Louisiana be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

I. OPINION BELOW

The opinion of the Louisiana Supreme Court is reported in *State of Louisiana v. Reuben L. Jones*, 251 La. 431, 204 So.2d 775, and is reproduced in the appendix following page 11 of appellant's jurisdictional statement.

II. JURISDICTION

Jurisdiction is invoked under 28 U.S.C. 1257 (2).

However, the appeal to the Louisiana Supreme Court from the conviction under Louisiana Revised Statutes 14:284 was a nullity and was dismissed by the Louisiana Supreme Court for lack of jurisdiction. Consequently, the appeal to the United States Supreme Court from the judgment of the trial court was not timely filed because it did not comply with Rule 11 of the Revised Rules of the Supreme Court and should be dismissed.

In the alternative, the Louisiana Supreme Court's dismissal of appellant's appeal from his conviction under Revised Statutes 14:284 rests on an adequate non-federal basis, namely, the lack of jurisdiction of the Louisiana Supreme Court over the appeal under the provisions of Article VII, Section 10 of the Louisiana Constitution.

In the further alternative, the appeal from the conviction under Revised Statutes 14:284 does not present a substantial federal question inasmuch as the maximum imprisonment which can be imposed under Revised Statutes 14:284 is six months in the parish jail. Even if the Sixth Amendment jury trial provi-

sion were applicable to state prosecutions through the Fourteenth Amendment, a prosecution under Revised Statutes 14:284 would be exempt from the jury requirement because the maximum period of imprisonment does not exceed six months. Cf. 18 U.S.C. Sec. 1; *Cheff v. Schnackenberg*, 384 U.S. 373.

The appeal from the convictions under Louisiana Revised Statutes 14:95(3) does not present a substantial federal question because this Court has consistently reiterated the view that the Due Process Clause of the Fourteenth Amendment does not incorporate the jury trial provision of the Sixth Amendment. *Maxwell v. Dow*, 176 U. S. 581, *Snyder v. Massachusetts*, 291 U.S. 97; *Palko v. Connecticut*, 302 U.S. 319.

Appellant's argument that he was prejudiced by denial of his right to trial by jury because of the comments made by the trial judge in denying the motion for a directed verdict, was raised for the first time in the state supreme court and was not considered by that court, as the motion for a directed verdict was not founded on that ground, and defendant made no objection and reserved no bill of exceptions to the alleged improper remarks of the judge at the time they were made. Therefore, under Rule 16 (b) of the Revised Rules of this Court, the question of the effect of the alleged impropriety of the trial judge's remarks is not properly before this Court because of appellant's failure to raise the issue in state court at the proper time and because the state supreme court did not pass upon the question.

Jurisdiction should therefore be declined.

III. QUESTION PRESENTED

Is the right to the twelve-man unanimous jury trial which is required by the Sixth Amendment so fundamental and essential to a fair trial that it is guaranteed by the Fourteenth Amendment in state misdemeanor prosecutions?

IV. STATEMENT

Appellant was charged in bills of information with two separate violations of Louisiana Revised Statutes 14:95(3) for possession of burglary tools, and also for violating Revised Statutes 14:284, the peeping tom statute, all of which are misdemeanors under Louisiana law.

He was tried by a judge without a jury, found guilty in all three cases, and sentenced to serve one year in the parish prison on each charge for possession of burglar tools, and six months for violation of R.S. 14:284, all sentences to run concurrently. From these convictions and sentences appellant prosecuted a single appeal to the Louisiana Supreme Court.

The Louisiana Supreme Court dismissed the appeal from the conviction under Revised Statutes 14:-284 on the ground that it lacked jurisdiction of an appeal from that conviction. The dismissal was based on Section 10, Article VII of the Louisiana Constitution which denies the Louisiana Supreme Court jurisdiction over appeals in misdemeanor cases wherein the penalty actually imposed does not exceed six months

imprisonment or a three hundred ($300.00) dollar fine.

The Louisiana Supreme Court affirmed the convictions and sentences under Revised Statutes 14:-95(3), rejecting appellant's contention that he was entitled to a jury trial of those misdemeanors under the Sixth and Fourteenth Amendments to the Constitution of the United States. The court held that a trial by jury is not a prerequisite to due process or an essential to a fair trial in a state court for any misdemeanor case.

V. ARGUMENT

The decision of the Louisiana Supreme Court, which holds that the Sixth Amendment jury trial right is not a prerequisite to due process and not essential to a fair trial of a state misdemeanor charge, is plainly correct.

As the Louisiana Supreme Court points out, the Sixth Amendment right of trial by jury does not extend to every criminal proceeding, and a jury is not demandable in federal trials for petty offenses. *Callan v. Wilson*, 127 U.S. 540; *D.C. v. Clawans*, 300 U.S. 617; *Cheff v. Schnackenberg*, 384 U.S. 373.

Yet it cannot be denied that under the due process clause of the Fifth Amendment, all federal defendants, even those being tried for petty offenses, are entitled to fairness and due process. *Cf. Tumey v. Ohio*, 273 U.S. 510; *Natal v. Louisiana*, 139 U.S. 621.

If the right to demand a jury were essential to a

fair trial and due process, not even the most petty offenders could be tried without a jury in federal court.

Therefore, it must be concluded that the right to jury trial in federal court exists only by virtue of Article 3 and the Sixth Amendment to the Constitution and not because a jury is essential to a fair trial.

The Sixth Amendment rights which have been applied to the states through the due process clause of the Fourteenth Amendment were so applied, not because they are found in the Sixth Amendment, but because they are essential to a fair trial, and a fair trial is required by the due process clause of the Fourteenth Amendment.[1]

As pointed out by the Louisiana Supreme Court, the test under due process, applicable to the case at bar, is whether the Sixth Amendment jury trial right is essential to a fair trial of a state misdemeanor charge.

As further pointed out by the Louisiana Supreme Court, evenhandedness and impartiality in the fact finding process are required for a fair trial. But the court correctly rejected as illogical the notion that a group of twelve laymen,[2] as compared to any other number of laymen, or as compared to a trained judge,

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[1]For authorities in support of this proposition and a fuller discussion thereof, the Court is respectfully referred to page 36 et seq. of the brief of the State of Louisiana in *Duncan v. State of Louisiana*, No. 410 of the Court's Docket, October Term, 1967.

[2]The Court's attention is respectfully called to *Patton v. the U.S.*, 281 U.S. 276, and the consequences of requiring all the states to try crimes by twelve-man unanimous juries.

or a panel of experts, is the only fair and impartial means for exercising the fact-finding function.

Unlike the due process clause of the Fourteenth Amendment, the Sixth Amendment jury trial right is not an abstract declaration of the rights of man, but deals only with the preservation of a concrete institution: the eighteenth century twelve-man unanimous jury. It cannot be logically argued that such a rigid institution, in which procedural reform is impossible, represents a right so fundamental that a fair trial is impossible without it.

It is respectfully submitted that decisions of this Court have established the principle that neither tradition nor logic requires jury trial as an essential of fairness and due process in a state misdemeanor prosecution. *Maxwell v. Dow*, 176 U.S. 581, followed the rationale of *Hurtado v. California*, 110 U.S. 516, and applied the test of fundamental fairness to determine that due process did not require a jury trial in a state prosecution. This Court has consistently reiterated that view. See, *Snyder v. Massachusetts*, 291 U.S. 97; *Palko v. Connecticut*, 302 U.S. 319; *Irvin v. Dowd*, 366 U.S. 717.

The history[3] of jury trial reflects the general

For a discussion of the results that would flow from such a holding, reference is made to the brief of the State of Louisiana, beginning on page 73, in *Duncan v. Louisiana*, No. 410 of the Docket of this Court, October Term, 1967.

[3]For authorities supporting the view that historically jury trial was not treated as an essential element of a fair

right of jury trial existing side by side with the power of the legislative branch to diminish that right by positive law providing for bench trial of specific offenses. The reason for dispensing with jury trials in certain cases at common law was essentially "the desire for a swift and convenient remedy" rather than any unifying principle as to the type of offense tried summarily. Frankfurter and Corcoran, "Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury," 39 Harvard L. Rev. 917, 927. The "desire for a swift and convenient remedy" continues to be applicable today and is beneficial to defendants and the state alike. Misdemeanors must be tried and disposed of quickly in order to protect defendants from having criminal charges pending against them for a period of time longer than the period of imprisonment if found guilty. From the beginning the states have constantly attempted to adjust the machinery and scope of jury trial with the volume of litigation in the interest of speed and efficiency.

From the states' point of view, the volume of cases handled by state courts is significantly larger than that handled by federal courts, state jury trial calendars are already congested, and the strain on the states' judicial systems of convening a common law jury for every misdemeanor should be obvious.[4]

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trial, the Court is respectfully referred to page 81 et seq. of the brief of the State of Louisiana in *Duncan v. Louisiana*, No. 410 of the Docket of this Court, October Term, 1967.

[4]The Court is respectfully referred to Appendix B and Appendix D of the brief of the State of Louisiana in *Duncan*

It is further submitted that the common law jury was imposed on the federal government because of the states' fear of a despotic central government. See the Federalist No. 83, (Hamilton). The inclusion in the Constitution of a right to trial by jury as a limitation on a feared despotic central government provides insufficient justification for imposing on fifty different states with diverse problems the rigid federal jury system with its essentially arbitrary technical incidents which were fashioned by federal legislation and court decisions for the federal courts alone and can hardly be said to be constitutionally mandated.

In view of the foregoing, it is respectfully submitted that the appellant presents no substantial question for the decision of this Court and that the appeal should be dismissed, and in the alternative the judgment and decree of the Louisiana Supreme Court should be affirmed.

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WILLIAM P. SCHULER,
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JOHN A. RICHARDSON,
District Attorney,
First Judicial District.
ALBERT S. LUTZ, JR.
First Assistant District Attorney,
First Judicial District.

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v. State of Louisiana, No. 410 of this Court's docket, October Term, 1967.

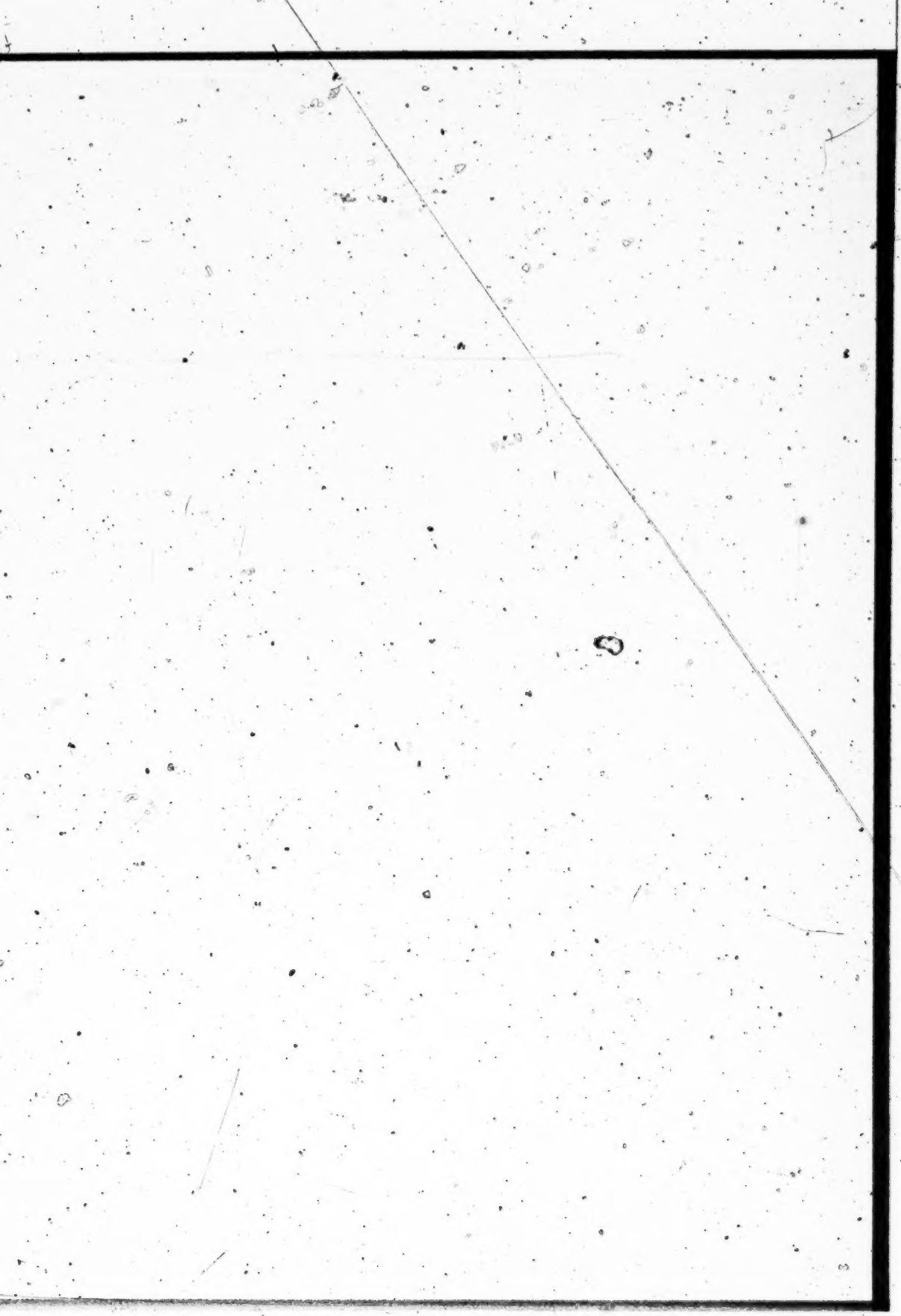
CERTIFICATE OF SERVICE

I, William P. Schuler, a member of the Bar of the Supreme Court of the United States, certify that a copy of the above and foregoing motion has been served on counsel for appellant by depositing same in the United States Mail, postage prepaid, addressed to Wellborn Jack, Jr., 1625 Slattery Building, Shreveport, Louisiana 71101.

New Orleans, Louisiana, this ..... day of May, 1968.

WILLIAM P. SCHULER

B-1386, 5-68



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No. 1255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

REUBEN L. JONES,

Appellant,

vs.

STATE OF LOUISIANA,

Appellee.

Appeal from the Supreme Court of Louisiana.

APPELLANT'S SUPPLEMENTAL JURISDICTIONAL STATEMENT

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No. 1255

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Appeal from the Supreme Court of Louisiana.

APPELLANT'S SUPPLEMENTAL JURISDICTIONAL STATEMENT

The Clerk of the Supreme Court of the United States has requested that we develope in a supplement to our Jurisdictional Statement the time factor involved in this appeal and the reasons supporting our position that this Court has jurisdiction of this appeal. We develope and discuss these matters below.

I. RESTATEMENT OF THE CASE

On December 9, 1966, Appellant was tried and convicted by a Judge of the First Judicial District Court in and for Caddo Parish, Louisiana, sitting without a jury, on two separate Bills of Information charging him with committing the crime of Possession of Burglar Tools and on a third Bill of Information which charged him with committing the crime of Peeping Tom. On January 6, 1967, the District Judge sentenced Appellant to serve a term of one year in prison on each charge of Possession of Burglar Tools and a term of six months in prison on the Peeping Tom charge, with all sentences running concurrently.

Appellant applied for and obtained on January 6, 1967, an order from the District Court allowing him to appeal his convictions on all three charges to the Supreme Court of Louisiana. In an opinion filed December 11, 1967, the Supreme Court of Louisiana affirmed Appellant's conviction on both charges of Possession of Burglar Tools. *State vs. Jones*, 251 La. 431, 204 So. 2d 775 (1967). At the same time, the Supreme Court of Louisiana dismissed, for lack of jurisdiction, Appellant's appeal from his conviction on the charge of Peeping Tom. No application for a rehearing was filed in the Supreme Court of Louisiana.

On January 6, 1968, pursuant to Rule 10 of the Rules of the Supreme Court of the United States, Appellant filed a Notice of Appeal with the Clerk of the Louisiana Supreme Court which, at that time, had possession

of the record. The case was docketed in this Court on March 23, 1968, as No. 1255, October Term, 1967.

The sole questions presented on this appeal are whether, in each of the criminal proceedings brought against him, Appellant was entitled to have his guilt or innocence determined by a fair and impartial jury under the Sixth and Fourteenth Amendments to the Constitution of the United States. The constitutional questions sought to be presented here were timely raised at every opportunity in the Courts below.

The constitutional questions presented here were first raised before trial in the District Court. Appellant filed, in each of the three criminal proceedings pending against him, identical written motions for a trial by jury. In each case, Appellant claimed that he was "entitled under the Sixth and Fourteenth Amendments to the Constitution of the United States to a trial by an impartial jury". The District Court, relying upon the authority of existing State law (Art. VII, Sec. 41, La. Constitution of 1921; La.R.S. of 1950, 15:340, 341), denied Appellant's motions. Appellant timely excepted to the District Court's ruling and in due course perfected Bills of Exception.

The constitutional claims asserted by Appellant in the District Court were renewed in the Supreme Court of Louisiana on Appellant's appeal from his convictions. The Supreme Court of Louisiana rejected Appellant's constitutional claims and, on the authority of existing State law, held that Appellant was not entitled to a trial by jury. *State v. Jones*, 251 La. 431, 204 So. 2d 775 (1967).

This Court has jurisdiction of the appeal by virtue of the provisions contained in 28 U.S.C. §1257 (2), since the Louisiana Courts have sustained the validity of State constitutional and statutory provisions denying Appellant the right to a jury trial on the crimes with which he was charged against Appellant's claim that he was entitled to a jury trial under the Sixth and Fourteenth Amendments to the Constitution of the United States.

II. THE APPEAL WAS TIMELY TAKEN

The written opinion and judgment of the Supreme Court of Louisiana in this case, which was dated and filed December 11, 1967, did not become final as a matter of State law until December 27, 1967. Under the applicable Louisiana law, a judgment of the Louisiana Supreme Court does not become final until the delay within which an application for a rehearing may be filed has expired, Art. 922, *La. Code of Criminal Procedure.* An application for rehearing must be filed, if at all, within fourteen days of the rendition of the judgment. Art. 922, *La. Code of Criminal Procedure.* Where the last day of the time allowed is a legal holiday, the time runs until the end of the next day which is not a legal holiday. Art. 13, *La. Code of Criminal Procedure.* In this case, therefore, the judgment of the Louisiana Supreme Court would ordinarily have become final on December 25, 1967. However, since December 25, 1967, was a legal holiday (La. R.S. of 1950, 1:55) the delay within which an application for a rehearing could be filed did not expire until December 26, 1967. Plainly, therefore, the judgment of the

Louisiana Supreme Court did not become "final" as a matter of State law until December 27, 1967.

It is equally clear that the appeal to this Court was timely taken, whether December 11, 1967, or December 27, 1967, is taken as the date on which the judgment of the Louisiana Supreme Court became "final" for Federal purposes. The applicable rule adopted by this Court provides that:

> "An appeal to review the judgment of a State court of last resort shall be deemed in time when the notice of appeal prescribed by Rule 10 is filed with the Clerk of Court possessed of the record within ninety days after the entry of such judgment." Rule 11, Rules of the Supreme Court of the United States. Cf. 28 U.S.C. §2101 (d).

In this case, Appellant filed his Notice of Appeal to this Court on January 6, 1968, with the Clerk of the Supreme Court of Louisiana, which at that time had possession of the record. Hence, it is indisputably clear that the appeal here was timely taken. Since the appeal was timely taken, this Court has jurisdiction of the appeal, whether the case was timely docketed in this Court or not. *United Public Workers v. Mitchell*, 330 U.S. 74, 84-86.

What has been said, of course, is clearly applicable here insofar as this appeal questions the validity of Appellant's convictions on the two separate charges of Possession of Burglar Tools which the Supreme Court of Louisiana expressly affirmed. However, the Supreme Court of Louisiana dismissed, for lack of jurisdiction,

Appellant's appeal in that Court insofar as it sought review of his conviction on the Peeping Tom charge. No Federal questions have been raised here as to the propriety of the disposition thus made by the Louisiana Supreme Court. Where an appeal is dismissed because not permitted by State law, the judgment of the lower court remains the reviewable judgment. See *Western Union Telegraph Co. v. Hughes*, 203 U.S. 505; *Collan v. Bransford*, 139 U.S 197. The question then is whether the judgment of the District Court denying Appellant the right to a jury trial on the Peeping Tom charge is reviewable by this Court on the present appeal.

Although the notice of appeal filed by Trial Counsel for Appellant did not expressly or specifically designate the judgment of the District Court as a judgment being appealed from, the Jurisdictional Statement unmistakably showed that Appellant was seeking review of the judgment which denied him the right to a jury trial on the Peeping Tom charge. That, obviously, was the judgment of the District Court — not the judgment of the Supreme Court of Louisiana which dismissed Appellant's appeal for lack of jurisdiction. Taking the appeal papers as a whole, the only reasonable implication is that the Appellant intended to appeal from the judgment of the District Court. This Court has consistently refused to permit technical defects to defeat substantial justice. See *Hoiness v. United States* 335 U.S. 297; *United States v. Elliott*, 223 U.S. 524; *State Farm Mutual Automobile Ins. Co. v. Palmer*, 350 U.S. 944. This Court should adhere to that policy here.

If Appellant's appeal papers are broad enough to support an appeal from the judgment of the District Court convicting him on the Peeing Tom charge, as we think they are, the question remains whether the appeal, with respect to that judgment, was timely taken. The resolution of this question, in turn, depends on whether Appellant's appeal from his conviction on the Peeping Tom charge prevented the judgment of the District Court from becoming final for Federal purposes until the Supreme Court of Louisiana rendered judgment dismissing the appeal for lack of jurisdiction. We submit that it did.

It is settled law that where the highest State Court has jurisdiction to review a judgment of a lower State Court, but refused to do so, the time within which certiorari may be applied for begins to run from the date of the order refusing review. *American Express Co. v. Levee*, 263 U.S. 19, 20-21. Similarly, where the trial court's judgment is final insofar as the Federal issues are concerned but appealable on non-Federal issues, this Court has held that it can directly review the Federal portion of that judgment following disposition of the non-Federal issues by the State Appellate Court. *Kentucky v. Powers*, 201 U.S. 1, 37-39. These decisions, if not controlling, are clearly persuasive authority for the proposition that the judgment of the District Court convicting Appellant on the Peeping Tom charge did not become final for Federal purposes until the Supreme Court of Louisiana dismissed the appeal from that judgment for lack of jurisdiction.

It might be argued, of course, that an appeal taken to a Court which has no jurisdiction is, technically speaking, no appeal at all. But this Court has held time and again that the requirement of finality must be given a "practical rather than a technical construction". *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 152; *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546; *Mercantile National Bank v. Langdeau*, 371 U.S. 555; *Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386. Moreover, considerations of federalism *(Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 69; *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 123-124) clearly support the view that the judgment of the District Court should not be regarded as final until the State Supreme Court has determined the question of jurisdiction.

The Supreme Court of Louisiana plainly had jurisdiction to determine its own jurisdiction. In this case, Appellant had substantial grounds for contending that the Supreme Court of Louisiana had jurisdiction to review his conviction on the Peeping Tom charge by appeal. Trial Counsel for Appellant thought that the Supreme Court of Louisiana had jurisdiction of the Peeping Tom conviction by virtue of the last paragraph of Sec. 10, Art. VII of the Louisiana Constitution of 1921, which provides that if a case is appealed properly to the Supreme Court on any issue "***the Supreme Court has appellate jurisdiction over all other issues involved in the case". In disposing of this contention, the Supreme Court of Louisiana held (204 So. 2d at 776):

> "This contention is without substance for the reason that the appeal from Appellant's conviction under R.S. 14:284 is separate and distinct from his appeals for the convictions in the other two cases. There are three cases and three appeals which have been improperly filed as one appeal. The constitutional provision relied on by counsel applies to a single case presenting several issues. In such instances, if this court has jurisdiction on only one issue, it has the right to take cognizance of and decide all other issues, even though those issues would not be directly appealable here . . ."

The statement that "There are three cases and three appeals which have been improperly filed as one appeal" is surprising since the Supreme Court of Louisiana itself had expressly sanctioned just such a procedure in *State v. Boylston*, 138 La. 21, 69 So. 860 (1915). Moreover, in considering a similar jurisdictional question in *State v. Peters*, 142 La. 250, 76 So. 703 (1917), the Supreme Court of Louisiana had held (76 So. at 703):

> ". . . The other case is *in no way involved* in the present one; hence the sentence in it cannot serve as a basis for jurisdiction in the present one. [emphasis added]
>
> "Appeal dismissed."

Here, the Peeping Tom charge was *directly and inextricably involved* with the charge of Possession of Burglar Tools as the facts clearly show. On July 8, 1966, Appellant was charged in a Bill of Information filed by the District Attorney in the First Judicial District Court with the crime of Possession of Burglar Tools (No. 68,678). By a separate Bill of Information (No. 68,676) filed on

the same day, Appellant was charged with the crime of Peeping Tom which was alleged to have been committed at the same time and place that the offense of Possession of Burglar Tools was committed. Section 14 of Title 95, La.R.S. of 1950, defines the crime of Possession of Burglar Tools as "[t]he ownership, possession, custody or use of any tools, . . . or other instrumentality customarily used by thieves or burglars at any time by any person with the intent to commit a crime; . . .". It was the theory of the State that on the single occasion described in these two Bills of Information, Appellant committed the crime of Possession of Burglar Tools because he had, or so the State alleged, possession of tools customarily used by burglars (a flashlight, a long screwdriver, and a pair of socks), with the intention of committing the crime of Peeping Tom. These two Bills of Information, therefore, charged Appellant with committing two crimes that were directly related: The Peeping Tom charge was an essential element of the State's case on the charge of Possession of Burglar Tools. For these reasons, the District Court ordered the two cases consolidated for trial and later for appeal. See, in this connection, Art. 706, *La. Code of Criminal Procedure* which provides that:

> "Upon motion of a defendant or of all defendants, if there are more than one, the court may order two or more indictments consolidated for trial if the offenses and the defendants, if there are more than one, could have been joined in a single indictment. The procedure thereafter shall be the same as if the prosecution were under a single indictment."

See also Art. 934 (6), *La. Code of Criminal Procedure*, defining the term "indictment" to include information and affidavit.

From what has been said, it is plain that the Peeping Tom charge was directly and inextricably involved in the first Possession of Burglar Tools charge filed. Since the Supreme Court of Louisiana had jurisdiction of Appellant's appeal from his conviction on the charge of Possession of Burglar Tools, it could reasonably be argued in the circumstances of this case that it also had jurisdiction of his conviction on the Peeping Tom charge.

III. THIS COURT HAS JURISDICTION OF THE APPEAL EVEN IF THE CASE WAS NOT TIMELY DOCKETED AND THE APPEAL SHOULD NOT BE DISMISSED.

The appeal in this case was docketed in this Court on March 23, 1968. If the judgment of the Louisiana Supreme Court became final on December 27, 1968, for Federal purposes, then the appeal was timely docketed in this Court. On this view, March 26, 1968, would have been the last day for docketing the appeal. On the other hand, if the judgment of the Louisiana Supreme Court became final on December 11, 1967, for Federal purposes, then the appeal was not timely docketed in this Court. In that case, the 90 day delay for docketing the appeal would have expired March 11, 1968, since the 90th day was Sunday, March 10, 1968. Hence, on that view, the appeal was docketed 12 days late. On the authority of

Market Street Railroad Co. v. Railroad Commission, 324 U.S. 548, 551-2, it seems likely that the appeal was not timely docketed.

Since the appeal was timely taken, however, this Court has jurisdiction of the appeal regardless of whether the case was timely docketed. *United Public Workers v. Mitchell*, 330 U.S. 75, 84-86. As this Court said in *Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co.*, 385 U.S. 32, it has been "generous in excusing errors of counsel" and is "generous in exercising our discretion to forgive a mistake and waive the consequences of negligence." We submit that in the circumstances of this case the Court should exercise its discretion and excuse any error in timely docketing the appeal.

We believe that the Court's indulgence is justified on the following grounds:

(1) Trial Counsel for Appellant, who prepared and filed the Notice of Appeal and the Jurisdictional Statement and docketed the appeal in this Court, thought that the 90 day period allowed for filing the Notice of Appeal and docketing the case in this Court began to run when the judgment of the Louisiana Supreme Court became final under State law. It never occurred to him that Federal standards of finality might differ from the applicable State standards. Trial Counsel for Appellant is not a member of the Bar of this Court and he had no prior

experience in this Court. This case is the first occasion that he has found it necessary to resort to this Court.

(2) Trial Counsel for Appellant knew that the case of *Duncan v. Louisiana*, No. 410, was pending in this Court and had been orally argued on January 17, 1968. Since that case involves similar issues, Trial Counsel delayed the preparation of the Jurisdictional Statement, with the hope that a decision in *Duncan* would be handed down before the delay for docketing the appeal expired.

(3) The State, in this case, was not injured or prejudiced in any way by any failure to timely docket the appeal.

(4) Unlike *Pittsburgh Towing Co.*, this is a criminal case. Appellant stands convicted of three serious crimes. If the convictions were legally obtained, then the State could justifiably insist that Appellant pay his debt to society. If, however, the convictions were illegally obtained because Appellant was deprived of his constitutional right to a jury trial, as we submit, it would be unconscionable to require him to serve the sentences imposed because of his attorney's error, if error there was, in timely docketing the case.

For these reasons, we submit that any error in timely docketing the case should be excused.

Respectfully submitted,

JACK & JACK

By: .....

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Attorneys for Appellant

ATTORNEY OF RECORD:

.....

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May, 1968.

APPENDIX

Article 13, Louisiana Code of Criminal Procedure:

> In computing a period of time allowed or prescribed by law or by order of court, the date of the act, event, or default after which the period begins to run is not to be included. The last day of the period is to be included, unless it is a legal holiday, in which event the period runs until the end of the next day which is not a legal holiday.
>
> * * * *

Article 922, Louisiana Code of Criminal Procedure:

> A. Within fourteen days of rendition of the judgment of the supreme court, in term time or out, a party may apply to the supreme court for a rehearing. The court may act upon the application at any time.
>
> B. A judgment rendered by the supreme court becomes final when the delay for applying for a rehearing has expired and no application therefor has been made.
>
> * * * *

Article 706, Louisiana Code of Criminal Procedure:

> Upon motion of a defendant, or of all defendants if there are more than one, the court may order two or more idictments consolidated for trial if the offense and the defendants, if there are more than one, could have been joined in a single indictment. The procedure thereafter shall be the same as if the prosecution were under a single indictment.
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Appeal from the Supreme Court of Louisiana.

APPELLANT'S PETITION FOR REHEARING

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APPELLANT'S PETITION FOR REHEARING

APPELLANT'S PETITION FOR REHEARING

For the following reasons, petitioner-appellant prays that the Court grant a rehearing of its June 10, 1968, *per curiam* dismissal of this appeal "for want of a substantial federal question."

The Administration of Criminal Justice in Louisiana and the Adjudicatory Processes of the Court Require that the Decision of the Court Herein be Informed by Brief and Argument and Supported by Reasoned Explanation Disclosing the Grounds Upon Which that Judgment Rests.

Three weeks before the *per curiam* dismissal of this appeal "for want of a substantial federal question", the Court decided *Duncan v. Louisiana*, 390 U.S. ....., 88 S. Ct. 1444, holding for the first time "that the right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction." 88 S. Ct. at 1450. In connection with this holding the Court in its opinion, 88 S. Ct. at 1453, recognized that "it is necessary to draw a line in the spectrum of crime, separating petty from serious infractions" and that this "definitional task necessarily falls on the courts." Although various criteria for distinction between petty and serious offenses are discussed generally by the Court in its opinion, the concluding paragraph of the Court's opinion clearly indicates that the offense involved in the *Duncan* case, Simple Battery, did not require settlement now upon particular criteria or the drawing now of a clear definitional line of demarcation:

> "We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes that a crime punishable by two years in prison is, based on past and contemporary standards in this

country, a serious crime and not a petty offense." 88 S. Ct. 1454.

The proper disposition of this instant appeal requires that the line of distinction properly left inexactly located in *Duncan* now be more closely drawn. By dismissing the instant appeal, the Court has, or has given the appearance of having, more closely drawn the line of distinction between petty and serious offenses. The Court has allowed to stand unreversed the trial and conviction without a jury by the State of Louisana of Reuben L. Jones for the offenses of Possession of Burglar Tools and Peeping Tom. These offenses are known to the bench and bar of Louisiana to involve in their elements moral turpitude and specific criminal intent and to be punishable by imprisonment for one or two years and six months respectively. Following as it does in the wake of *Duncan*, the dismissal of this appeal cannot escape construction by bench and bar in Louisiana as a holding that these offenses are petty offenses and for that reason did not present "a substantial federal question."

Has, however, the Court so held? The per curiam opinion does not disclose the grounds upon which the Court's judgment rests. Until the grounds supporting the Court's dismissal of this appeal are made known by reasoned explanation, the *Duncan* case and this case will remain irreconcilable to bench and bar in Louisiana to the detriment of the administration of criminal justice in that state. At best — or at worst — the practical effect below of the dismissal of this appeal will be to limit

the holding in *Duncan* to the offense of Simple Battery, the offense with which Gary Duncan was charged.

If the Court has dismissed this appeal on the ground that the offenses of Possession of Burglar Tools and Peeping Tom are in its judgment "petty offenses," then the Court has dismissed on a ground neither urged nor argued by Louisiana in its Motion to Dismiss and in the Alternative to Affirm filed herein. Louisiana's motion, as were appellant's Original and Supplemental Jurisdictional Statements, was prepared prior to decision in *Duncan*. Prior to that decision the overriding concern of both parties to this case was with the fundamental question of whether the right of jury trial protected by the Sixth Amendment in federal criminal proceedings was also extended to state criminal proceedings by the Fourteenth Amendment. For argument on what was then the overriding issue, both parties herein specifically referred in their filings to the more extensive exploration of that issue found in the briefs on the merits filed in the then pending *Duncan* case. The *right* to jury trial had first to be established by *Duncan* for there to be reason for either party herein to embark upon the task of fully informing the Court of the facts and arguments bearing upon the subsequently raised issue of whether these particular offenses were serious or petty. To the extent that the dismissal of this appeal is or appears to be a holding that these particular offenses are petty offenses, the decision of the Court has not been informed by either brief or oral argument. Opportunity to do so should be afforded both parties by granting a rehearing so that the court may

make an informed judgment to be supported by reasoned explanation to the end that the state courts of Louisiana may be able to determine with some degree of certainty which offenses are serious and which are petty.

Infinitely more disturbing than the effect upon the administration of criminal justice in Louisiana, is the effect of the Court's *per curiam* herein upon the adjudicatory processes of the Court itself. This disturbing effect has been explored and discussed by distinguished friends and observers of the Court. Herbert Wechsler in his article, *Toward Neutral Principles of Constitutional Law*, 73 Harvard Law Review 1 (1959), poses the problem of the *per curiam* in the following language so particularly applicable to the new problems of constitutional interpretation and application opened up by *Duncan:*

> "Given the sublety and difficulty of the problem, the need and opportunity for clarifying explanation, are such unexplained decisions in a new domain of constitutional interpretation consonant with standards of judicial action that the Court or we can possibly defend? I realize that nine men often find it easier to reach agreement on result than upon reasons and that such difficulty may be posed within this field. Is it not preferable, however, indeed essential, that if this is so the variations of position be disclosed?" 73 Harv. L. Rev. 1, 21 (1959).

Professor Wechsler's answer to his own rhetorical question is equally relevant to the dismissal of the instant appeal:

> "The virtue or demerit of a judgment turns, therefore, entirely on the reasons that support it and

their adequacy to maintain any choice of values it decrees, or, it is vital that we add, to maintain the rejection of a claim that any given choice should be decreed." *Id.* at 19.

The integrity of the adjudicatory processes of the Court require that rehearing be granted and that the Court, informed by brief and argument, dispose of the substantial federal questions herein presented, by opinion on the merits supported by reasoned explanation disclosing the grounds on which its judgment rests.

Possession of Burglar Tools is a Serious Offense

Appellant was charged in two separate Bills of Information with two separate violations of Possession of Burglar Tools, Louisiana Revised Statutes 14:95, which statutory definition reads as follows:

"A. Illegal carrying of weapons is:

* * * * *

(3) The ownership, possession, custody or use of any tools, or dynamite or nitroglycerine, or explosives, or other instrumentality customarily used by thieves or burglars at any time by any person *with the intent to commit crime.*" (Emphasis added).

Both Bills of Information (No. 68,678 and No. 68,964) alleged that appellant was on the premises of another with a screwdriver and flashlight in his possession *"with the intent to commit the crime of Simple Burglary."* (Emphasis added). Proof of specific criminal intent to com-

mit an indisputably serious offense, Simple Burglary, was an essential element of the offense of Possession of Burglar Tools for which appellant was tried and convicted without a jury.

This offense is not one of those petty offenses triable before a judge alone in the original thirteen states at the time of the adoption of the Constitution. Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917 (1926). Nor is it even remotely analogous to any of those judge-tried petty offenses. Had the offense existed at Common Law, being most analogous to the offense of Criminal Attempt, we submit that it would have been triable by jury, involving as it does a universally reprehensible degree of moral turpitude.

Insofar as the penalty provisions of a Louisiana criminal statute can be taken to be for that state an approximate "gauge of its social and ethical judgments," *District of Columbia v. Clawans*, 300 U. S. 617, 628; 57 S. Ct. 660, 663 (1937), the offense of Possession of Burglar Tools is a serious offense by the federal standard of 18 U.S.C. 1, which defines petty offenses as those punishable by no more than six months imprisonment. The penalty provision of the Possession of Burglar Tools Statute, Louisiana Revised Statutes 14:95 B and C, reads as follows:

> "B. Whoever commits the crime of illegal carying of weapons shall be fined not more than $500.00, or imprisoned for not more than *one year* or both. (Emphasis added).

"C. On a second conviction, the offender shall be fined not less than $200.00 nor more than $1,000.00, or imprisoned for not more than *two years*, or both." (Emphasis added).

Appellant could have received maximum sentences of one and two years respectively for the first and second convictions of this statute.

We submit that there can be no question but that Possession of Burglar Tools as defined by Louisiana Revised Statutes 14:95 (3) is a serious offense constitutionally triable by jury because of both the moral quality of the offense and the length of the authorized prison term.

Peeping Tom is a Serious Offense

By a third Bill of Information (No. 68,676) appellant was charged with having committed the offense of Peeping Tom on the same date and at the same place and time that it was alleged in the first Burglar Tools Bill of Information (No. 68,678) that he committed that offense. Peeping Tom is defined by Louisiana Revised Statutes 14:284 in the following language:

"No person shall perform such acts as will make him a 'Peeping Tom' on or about the premises of another, or go upon the premises of another for the purpose of becoming a 'Peeping Tom'.

" 'Peeping Tom' as used in this Section means one who peeps through windows or doors, or other places situated on or about the premises of another for the purpose of spying upon or invading the privacy of persons spied upon without the consent of the

persons spied upon. It is not a necessary element of this offense that the 'Peeping Tom' be upon the premises of the person being spied upon."

This statute is found in Chapter 2, Part II of the Louisiana Criminal Code under the heading "OFFENSES AFFECTING PUBLIC MORALS." Also classified under that heading are the morally reprehensible offenses of "Operation of Places of Prostitution" (14:282) and "Telephone Communications, Improper Language" (14:-285), which latter offense makes *obscene telephone calls* punishable by fine of five thousand dollars and imprisonment of two years. Clearly, the offense of Peeping Tom has been classified by the Legislature as, and is, a sex offense.

The maximum penalty provided for the violation of the Peeping Tom statute is but six months and/or fine of five hundred dollars. Under the federal standard of 18 U.S.C. 1 the Louisiana offense of Peeping Tom is a petty offense. We submit that this federal standard cannot, at least in this instance, be taken as a measure of the social and ethical judgments of the State of Louisiana as applied to the offense of Peeping Tom.

The federal standard of 18 U.S.C. 1 was written as part of a skillful and careful comprehensive revision and review of federal crimes culminating in the enactment of Title 18 on September 1, 1948, as the new Federal Criminal Code. Comprehensive review of the maximum punishment prescribed for various crimes was undertaken in the interest of achieving rational uniformity within the

classification of 18 U.S.C. 1. The work of the revision committee in this regard is described by Hon. Alexander Holtzoff in his Preface to Title 18, U.S.C.A., West Publishing Co., at Page VI in the following words:

> "While in general the new Title 18 constitutes a restatement of pre-existing law, many changes have been made in the punishments prescribed for various crimes. In some instances the maximum penalties were increased, in others they were reduced. *The purpose was to arrive at uniform maximum penalties insofar as possible for similar crimes.* Wide discrepancies on that subject had crept into the law from time to time owing to the fact that various criminal provisions had been enacted at different times. *Violations of regulatory statutes not involving moral turpitude have been uniformly transformed by the Code into misdemeanors* in instances in which previously they were felonies, and the maximum penalty of one year's imprisonment or a $1,000 fine, or both, has been prescribed." (Emphasis added).

No such review of *maximum* penalties was undertaken by the Louisiana State Law Institute in its preparation of the Louisiana Criminal Code of 1942, now reenacted as Title 14 of the Revised Statutes of Louisiana and in which the offense of Peeping Tom is found. Dale E. Bennett, Professor of Criminal Law at Louisiana State University Law School and Reporter for the revision committee which drafted the Louisiana Criminal Code of 1942 has written at great length of the work of the committee in his article in 5 La. L. Rev. 6 (1942), *The Louisiana Criminal Code.* This article is reproduced in and referred

to throughout Vol. 9 of *West's Louisiana Statutes Annotated*, containing Title 14 of the Louisiana Revised Statutes. In his comments on revision of penalty provisions, reproduced on page 9 of *West's*, *id.*, Professor Bennett makes no mention of any concern for establishing a uniform scheme of maximum penalties proportioned to the seriousness of the various offenses and limits himself to the following remarks:

> "An important change, effected throughout the Code is the elimination of *minimum* penalties, except for a few very serious offenses. This is in accord with a uniform trend in penal legislation to vest a larger discretion in the sentencing judge: and is in recognition of the idea that the criminal himself (his age, physical and mental characteristics, social and economic background, and chance of rehabilitation), as well as the specific crime committed, should be carefully considered in the imposition of sentence. The definitions of and distinctions between substantive crimes are, *at best*, general legislative categorizations of criminal responsibility" (Emphasis added). 5 La. L. Rev. 6, 7 (1942).

Nor was their any reason for the drafters of the Louisiana Criminal Code of 1942 to concern themselves with producing a uniform scheme of maximum sentences geared to the severity of the various offenses. Under Louisiana law the *place where* the accused is to be imprisoned, not the length of imprisonment, is the factor which determines whether he is entitled to trial by jury. La. Const., Art. VII, Sec. 41. If imprisonment may not be at "hard labor", the case may not under the Louisiana

constitutional provision be tried by a jury.' The phrase "imprisonment at hard labor" used in the above cited constitutional provision is a phrase of art used in Louisiana Law denoting confinement in the state penitentiary as opposed to confinement in the parish jail. It has been expressly held by the Louisiana Supreme Court that confinement in the parish jail subject to actual physical hard labor in a road gang is not "imprisonment at hard labor". *State v. Hamilton*, 128 La. 91, 54 So. 482. The distance separating the federal scheme and the Louisiana scheme is so great that one cannot rationally apply the federal standard of 18 U.S.C. 1 to a Louisiana offense to determine its seriousness or not.

One must look to the moral quality of the offense itself where the maximum penalty is six months or less. For this approach there is precedent in the jurisprudence of this Court. *District of Columbia v. Colts*, 282 U.S. 63, 51 S. Ct. 52 (1930). In *Colts*, the defendant was charged with reckless operation of a motor vehicle on the streets of the District of Columbia at a speed greater than 22 miles per hour "so as to endanger property and individuals". The offense was punishable by fine of $100.00 and imprisonment of *30 days*. The Court held that this was a "grave offense" within the jury trial provision of the Sixth Amendment and that the defendant was entitled to a jury trial. The Court based its decision not on the severity of the penalty (a maximum of 30 days), but upon the moral quality of the offense. The court distinguished between offenses which were *malum in se* and offenses which were merely *malum prohibitum*. The Court

found that the language of the statute, "so as to endanger property and individuals", determined that this species of speeding offense was *malum in se.*

The *Colts* case was not cited by the Court in *Duncan* The District of Columbia case cited in *Duncan* by the Court was *District of Columbia v. Clawans*, 300 U. S. 617, 57 S. Ct. 660 (1937), decided seven years after *Colts. Clawans* aptly illustrates the proper application of the distinction drawn in *Colts* between those offenses which are *malum in se* and those which are merely *malum prohibitum.* In *Clawans* the Court held that the defendant, who had been convicted of selling second-hand property without a license, namely, the unused portion of railway excursion tickets, was not entitled to a trial by jury even though the maximum sentence which could be imposed was 90 days, three times the maximum sentence in *Colts.* The violation of this statute was at most an infringment of local police regulations and its moral quality was relatively inoffensive; it was merely *malum prohibitium.* See also *Natal v. State of Louisiana*, 139 U.S. 621, 11 S. Ct. 636 (1891) in which no jury was required for the offense of violating a New Orleans city ordinance prohibiting the keeping of a private market within six blocks of a public market.

We respectfully submit that the moral quality of the offense of Peeping Tom, a sex offense, is such that a jury is constitutionally required for its trial even though

that offense is punishable by a maximum sentence of only six months.

For the reasons stated, petitioner should be granted a rehearing.

Respectfully submitted,

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June, 1968

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

JONES *v.* LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 1255. Decided June 10, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

THE CHIEF JUSTICE would dismiss the appeal for want of jurisdiction, treat the papers submitted as a petition for a writ of certiorari, and grant the petition for a writ of certiorari.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent.